SOUTHERN BANK BHD

v.

AYER KEROH PARK SDN BHD

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[ORIGINATING SUMMONS NO: 1-24-535-2003]
25 FEBRUARY 2005

LAND LAW: *Charge - Order for sale - Order for sale granted by land administrator - Absence of a bidder - Matter referred to High Court under s. 265(3)(b) National Land Code - Whether plaintiff's prayer for order for sale fell within ambit of s. 265(3A) National Land Code - Whether there was cause to the contrary - National Land Code, ss. 256, 265(3)(b), (3A)*

This was an application by the plaintiff seeking an order pursuant to s. 256 of the National Land Code ('the NLC') to sell certain land by means of a public auction. The plaintiff had given the defendant banking facilities and the defendant had created three registered charges over the land in favour of the plaintiff by way of security. Upon the defendant's default in complying with the terms of the charges, the plaintiff served the default notices in Form 16D ('the statutory notices'). As a consequence of the defendant's failure to comply with the necessary payment pursuant to the statutory notices, the plaintiff applied to the land administrator ('the LA') for an order for sale, which was granted. Although two public auctions were conducted, there was no bidder, and the LA consequently issued a certificate and referred this matter to this court under s. 265(3)(b) of the NLC. The issue that needed to be addressed herein was whether the plaintiff's prayer for an order for sale pursuant to s. 256 of the NLC could appropriately be classified as a case falling within the ambit of s. 265(3A) of the NLC. The defendant also contended that there was a cause to the contrary established *ie*, that the charge had failed to meet the conditions precedent for the making of an application for an order for sale on the basis that the latter statutory notice was defective and had contravened s. 254(1) of the NLC.

Held (allowing the application):

[1] In the light of the absence of a bidder, the reference by the LA to this court was clearly consistent with s. 265(3)(b) of the NLC. Upon a true construction of the clear and unambiguous provision of s. 265(3A) of the NLC, it was abundantly plain that the plaintiff's application for an order for sale under s. 256 of the NLC would appropriately be classified as a

case falling within the ambit of s. 265(3A) of the NLC. In the circumstances, the plaintiff's prayer as pleaded in the originating summons was proper and the plaintiff was able to legitimately rely on s. 265(3A) of the NLC; hence, the contention of the defendant to the contrary did not appear to be of any merit. (p 137 c-g)

[2] The two statutory notices in Form 16D had been served on the defendant for the purposes of obtaining the order for sale from the LA, which had already made an order in terms thereof and there was no appeal against the LA's order for sale. In this court's view, there could be no issue arising from there and there was no way the defendant could successfully mount the challenge in relation to the statutory notices. Thus, the defendant's case was devoid of merits. (pp 139 a & 140 e)

Case(s) referred to:

Arab Malaysia Finance Bhd v. Shamsuddin Hj Ahmad & Anor [1997] 4 CLJ Supp 469 ***(foll)***

Bank Islam Malaysia Bhd v. Shamsuddin Hj Ahmad [1999] 450 MLJU 1 ***(foll)***

Citibank Bhd v. Mohamad Khalid Farzalur Rahaman & Ors [2000] 3 CLJ 739 CA ***(refd)***

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(dist)***

Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 FC ***(refd)***

Lee Gee Pheng v. RHB Bank Bhd [2003] 4 CLJ 639 CA ***(foll)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 FC ***(refd)***

Muniandy & Anor v. Muhammad Abdul Kader & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116 SC ***(dist)***

Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363 FC ***(refd)***

Legislation referred to:

National Land Code, ss. 254(1), 256, 263, 265(3)(b), (c), (3A)
Rules of the High Court 1980, O. 83 r. 3

For the plaintiff - Kee Tong Kiak; M/s Chee Siah Le Kee & Partners
For the defendant - AB Ng; M/s AB Ng & Assoc

Reported by Suresh Nathan

a

JUDGMENT

Low Hop Bing J:

Application

This is an application by way of originating summons filed by the plaintiff
b seeking an order pursuant to s. 256 of the National Land Code 1965 to sell by public auction the pieces of land held under Geran Mukim 320, 321 and 322, Lot Nos. 2937, 2938 and 2939, in the mukim of Durian Tunggal, district of Alor Gajah, state of Melaka ("the land").

c A reference hereinafter to a section is a reference to that section in the National Land Code 1965.

Factual Background

It is uncontroverted that the plaintiff had given the defendant banking facilities for which the defendant had created three registered charges over the land in
d favour of the plaintiff by way of security.

Upon the defendant's default in complying with the terms of the charges, the plaintiff had on 24 May 2001 and 31 May 2001 served the default notices in Form 16D ("the statutory notices"). As the defendant has failed to comply with the requirement to make payment pursuant to the statutory notices, the plaintiff
e had on 13 July 2001 applied to the Alor Gajah land administrator for an order for sale, which was granted by the land administrator in the presence of the defendant and its solicitors.

Two public auctions had been conducted *viz.* on 28 June 2003 and 3 October
f 2003 respectively, but there was no bidder. Consequently, the land administrator had on 3 October 2003 issued a certificate and referred this matter to this court under s. 265(3)(b).

Section 265(3A)

Mr. A.B. Ng, learned counsel for the defendant contended that the plaintiff
g could not rely on s. 265(3A), as the plaintiff's originating summons was praying for an order pursuant to s. 256 and that the plaintiff is bound by its pleadings on the basis of *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; and *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196.

h

For the plaintiff, learned counsel Mr. Kee Tong Kiak responded that the plaintiff is able to place reliance on s. 265(3A).

i

Having considered the respective submission of the counsel in relation to s. 265(3A), I am of the view that the issue to be addressed herein is whether the plaintiff's prayer for an order for sale pursuant to s. 256 in this originating summons can appropriately be classified as a case coming within the ambit of s. 265(3A). For this purpose, it is essential to examine the facts of the case which reveal that the two public auctions were conducted pursuant to the land administrator's order for sale under the direction of the land administrator pursuant to s. 265.

In the light of the absence of bidder, the reference by the land administrator to this court is clearly consistent with s. 265(3)(b) which reads as follows:

> If at the subsequent sale no bid is received at or above the reserved price, the Land Administrator shall:
>
> (a) …
>
> (b) withdraw it from the sale and refer the matter to the Court.

Since this matter has been referred to this court, it follows that s. 265(3A) would apply. The relevant provision of s. 265(3A) merits reproduction as follows:

> (3A) The Court may substitute for the order of the Land Administrator an order for sale under section 256 or make such order as it may think just:
>
> Provided that the Court shall not make any order to the Land Administrator to carry out the sale.

The order which the plaintiff seeks in this originating summons is an order for sale under s. 256 and is one of the orders specifically stated in s. 265(3A). Upon a true construction of the clear and unambiguous provision of s. 265(3A) above, it is abundantly plain to me that the plaintiff's application for an order for sale under s. 256 would appropriately be classified as a case coming within the ambit of s. 265(3A). In the circumstances, I am of the view that the plaintiff's prayer as pleaded in the originating summons is proper and that the plaintiff is able to legitimately rely on the above provision of s. 265(3A). Hence, the contention for the defendant to the contrary does not appear to be of any merit.

Nevertheless, for purposes of completeness, I shall now consider the two authorities cited for the defendant pertaining to the principles of pleading.

First, *Muniandy, supra,* concerns a claim for vacant possession of land under the Control of Rent Act 1960. Before the Supreme Court, appellants applied to introduce and argue a fresh point not pleaded or argued in the court below that the appellants had an equitable interest in the land and as such were not trespassers but have a tenancy coupled with an equity. This was not allowed by the Supreme Court where the judgment was delivered by Mohamed Azmi SCJ (as he then was).

The second case is *Janagi, supra,* where Sharma J (as he then was) held that it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings.

I pause here to state that the procedural law requiring the decision of the court to be based on pleadings by which the parties are bound has never been doubted and has consistently been treated as trite law. However, in the light of my finding that the plaintiff's prayer under s. 256 comes within the ambit of s. 265(3A), I do not think that *Muniandy, supra,* and *Janagi, supra,* can be of any assistance to the defendant.

Statutory Notices In Form 16D

The defendant relied on the second limb in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 FC for the purposes of establishing a cause to the contrary ie, that the charge has failed to meet the conditions precedent for the making of an application for an order for sale, on the basis that Form 16D dated 31 May 2001 is defective and has contravened s. 254(1) in that Form 16D requires the defendant to remedy the breach within seven days while clause 37 of the charge prescribes a period of 14 days. The defendant also referred to *Citibank Bhd v. Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 3 CLJ 739; and *Syarikat Kewangan Melayu Raya Bhd. v. Malayan Banking Bhd.* [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363.

It was further argued for the defendant that *Arab Malaysia Finance Bhd v. Shamsuddin bin Hj Ahmad & Anor* [1997] 4 CLJ Supp 469; and *Lee Gee Pheng v. RHB Bank Bhd* [2003] 4 CLJ 639 are supportive of the defendant's contention.

For the plaintiff, it was argued that the defendant has not disputed the Form 16D dated 24 May 2000 and added that in any event the statutory notice in Form 16D is not relevant; *Arab Malaysia Finance, supra*; *Bank Islam Malaysia Bhd v. Shamsuddin bin Haji Ahmad* [1999] 450 MLJU 1; *Lee Gee Pheng, supra,* were cited for the plaintiff.

In my judgment, it is to be noted that two statutory notices in Form 16D had been served on the defendant for the purposes of obtaining the order for sale from the land administrator who has already made an order in terms thereof and there was no appeal against the land administrator's order for sale. In my view, there can be no issue arising therefrom. In this court, I am unable to see how the defendant could successfully mount the challenge in relation to the statutory notices.

In *Arab Malaysia Finance, supra,* cited for the defendant, a reference was made by the land administrator to the High Court under s. 265(3). The defendant contested the plaintiff's application to substitute for the order of sale of the land administrator an order of sale by the court, arguing, *inter alia,* that there had been non-compliance with O. 83 r. 3 of the Rules of the High Court 1980. Hishamudin J explained that the High Court hearing the reference must exercise its powers under s. 265(3)(c) and not to dwell on the issue whether or not the order for sale ought to have been made in the first place or whether or not there has been due compliance with O. 83. The court should direct its mind on the issue as to what was the best means of selling the property in question bearing in mind the interests of the chargor and the chargee and the fact that the second auction held at the land office had failed to attract any bidder. The plaintiff's application was allowed.

A similar application was made by the plaintiff under s. 265(3) in *Bank Islam Malaysia, supra,* but was opposed by the defendant on the ground of cause to the contrary pertaining to the calculation of interest under the Islamic Banking Act 1983 and O. 83 r. 3. Following the judgment of Hishamudin J in *Arab Malaysia Finance, supra,* Alauddin J (now FCJ) held that in an application under s. 265(3), existence of a cause to the contrary is not relevant and hence allowed the plaintiff's application.

In *Lee Gee Pheng, supra,* upon a reference made by the land administrator under s. 265(3)(b), the chargee bank's application for a substitute order for sale was allowed by the High Court but the chargor appealed against that order, which appeal was later withdrawn by the chargor who subsequently applied to have the substitute order set aside. The High Court dismissed the application and the chargor appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal in a judgment delivered by Nik Hashim JCA at pp. 643h and 644(a)-(d) authoritatively stated, *inter alia,* that s. 265(3)(c) does not mandate that an application for a substitute order for sale be treated by the court as a fresh application for an order for sale but confers upon the court the power to substitute the land administrator's order for sale under s. 263

with an order for sale under s. 256 ie, to transform the land administrator's order into a High court order and that it would be unnecessary to issue a fresh notice in Form 16D. The Court of Appeal has thereby concurred with and approved the judgments of Hishamudin J in *Arab Malaysia Finance, supra*; and Alauddin J (now FCJ) in *Bank Islam Malaysia, supra.*

Section 265(3)(c) appears to have been amended and substituted by s. 265(3A). In my view, what was stated by the Court of Appeal in relation to s. 265(3)(c) is applicable, *mutatis mutandis*, to s. 265(3A) and so the aforesaid three authorities clearly militate against the defendant's contention.

Finally, in *Citibank Bhd, supra*, the borrower's contention on the necessary period of service for Form 16D was upheld by the trial judge, but on appeal, the Court of Appeal in a judgment delivered by Gopal Sri Ram JCA, *inter alia*, explained that nowhere in the judgment of the Federal Court in *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 was there any reference to an inability on the part of a registered chargor to agree to a lesser notice period. Hence, an order for sale was granted. I cannot see any support which the defendant may derive from the Court of Appeal judgment.

Conclusion

On the foregoing grounds, I hold that the defendant's case is devoid of merits. I therefore allow the plaintiff's application and make an order in terms thereon.